No. 97-634

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN;
JEFFREY A. BEARD, PH.D.; JEFFREY K. DITTY;
DOES NUMBER 1 THROUGH 20 INCLUSIVE,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Americans With Disabilities Act applies to inmates in state prisons.

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INTEREST OF THE *AMICI CURIAE* [1]

Amici are organizations whose members include state, county, and municipal governments and officials

[1] The parties have consented to the filing of this brief *amicus curiae.* Letters indicating their consent have been filed

throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.

"Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). Because corrections administrators are responsible for every aspect of inmates' lives, "the possibilities for litigation . . . are boundless." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Moreover, inmate populations have a substantially greater percentage of persons with ADA covered disabilities than the population at large. The court of appeals' holding that the ADA protects state prisoners makes prison management even more complex and difficult, subjecting administrators' decisionmaking to endless judicial second guessing and thereby "unnecessarily . . . perpetuat[ing] the involvement of the federal courts in affairs of prison administration." *Id.* at 407; *see also Lewis v. Casey*, 116 S.Ct. 2174, 2185 (1996).

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

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with the Clerk of the Court. Pursuant to Rule 37.3 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Amici adopt petitioners' statement.

SUMMARY OF ARGUMENT

1. One of the States' core functions is protecting the lives, liberty and property of their citizens through the mechanisms of the criminal law. A principal means by which the States accomplish this responsibility is by committing to a term of imprisonment those "persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

The Court's cases interpreting both the contours of fundamental rights within prisons and the Eighth Amendment recognize that the practical necessities of prison administration require that prison officials be given broad deference. As the Court has explained, "the realities of running a penal institution are complex and difficult." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977).

2. Affirmance of the court of appeals' holding would make state prison administration substantially more complex and difficult than it already is. Various surveys indicate that prison populations have a much greater percentage of persons with such ADA covered disabilities as HIV infection and AIDS, learning disabilities, mental retardation, psychological disorders, drug addiction and alcoholism. In most state prison systems, inmates are classified and assigned to facilities based, in part, on their disabilities. Administrators engage in this practice to meet disabled inmates' needs in a cost-effective manner. Yet this practice apparently violates a Justice Department regulation (28 C.F.R. § 35.130(b)(2)), and has prompted several

ADA suits by inmates who assert that they must be mainstreamed into the general prison population.

Indeed, because prison administrators are responsible for every aspect of prisoners' lives, such fundamental decisions as allocating jobs in prison industries, spaces in educational and vocational training programs, recreational opportunities, and other institutional privileges are likely to prompt costly and fact-intensive ADA suits. If the ADA is held to apply, the decisions of prison administrators will be subject to endless judicial second-guessing, a result contrary to this Court's longstanding recognition that federal courts are not to become "the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuat-[ing] the involvement of the federal courts in affairs of prison administration." *Turner v. Safley*, 482 U.S. 78, 89 (1987) (citation omitted).

3. The court of appeals' holding that the ADA's "public services" provisions apply to state prisons ignores this Court's longstanding recognition of the centrality of prison administration to the States' sovereign interests. Its holding cannot be affirmed given the numerous indications in the statute which demonstrate that Congress did not intend for the ADA to apply to state prisoners.

Prisons do not provide "public services." As the Fourth Circuit has noted, this language "connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded." *Amos v. Maryland Dept. of Pub. Safety & Corr. Servs.*, 126 F.3d 589, 596 (4th Cir. 1997) (citation omitted). Prisons simply do not provide "public services" in the same way that a state university or park system does. Moreover, to "meet[] the essential eligibility requirements" for "participation in [prison] programs or activities," 42 U.S.C. § 12131(2), a person must be incarcerated, an act which removes them from the public at large.

The conclusion that Congress did not intend for the ADA to apply to state prisoners is buttressed by its findings. Most significantly, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Notably, Congress did not include such terms as "incarceration," "imprisonment," or "corrections" in this finding, a telling omission given that there were 700,000 prisoners in state custody at the time of the ADA's enactment, a population which greatly exceeded the number of patients institutionalized in state mental hospitals and residental facilities. Other findings demonstrate that Congress enacted the ADA to enable the disabled to engage in "independent living," and "to pursue those opportunities for which our free society is justifiably famous." *Id.* § 12101(a)(8) & (9). The absence of any findings manifesting Congress' intent to apply the ADA to state prisoners reinforces the conclusion that the court of appeals' holding should be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE AMERICANS WITH DISABILITIES ACT APPLIES TO INMATES IN STATE PRISONS

The court of appeals erred in holding that respondent has a cause of action under the Americans With Disabilities Act (ADA) to challenge the decision of Pennsylvania's prison administrators which denied him entry into a motivational boot camp. Regardless of whether the operations of the States' corrections departments constitute a "program or activity" under the literal language of the statute, *see* 42 U.S.C. § 12132, this language cannot be deemed to manifest Congress' intent to apply the ADA's "Public Services" subchapter to state prison systems because there are other contrary indications in the statute.

As explained below, the management of prison systems is a core state function. This Court's cases interpreting both the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishments" and the contours of fundamental rights in the prison setting establish that state prison administrators are entitled to broad deference in carrying out their duties. Thus, even if Congress has the power to subject state prison systems to the ADA, *see* Pet. App. 11a, the federal courts cannot presume that Congress did so given the numerous contrary indications in the statute. This Court should therefore reverse the judgment of the court of appeals.

A. State Prison Administration Is Entitled To Substantial Deference Under The Constitution

1. It is axiomatic that "[t]he Constitution created a Federal Government of limited powers," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and that " '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' " *New York v. United States*, 505 U.S. 144, 155 (1992) (quoting U.S. Const. amend. X). As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State.

The Federalist No. 45, at 296 (Isaac Kramnick ed. 1987). *See also Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone.").

One of the ways in which the States accomplish this core function of securing "internal order" and protecting "the lives, liberties, and properties of the people," Federalist No. 45, at 296, is through defining and punishing criminal activity. As this Court has repeatedly observed, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotations and citations omitted). One of the principal means

by which the States enforce the criminal law is by committing to a term of imprisonment those "persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

In cases interpreting both the Eighth Amendment and the contours of fundamental rights within prisons, the Court has recognized that the practical necessities of prison administration require that the decisions of prison officials be given broad deference:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable . . . .

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

Thus, the Court, while acknowledging that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," has held that a prison regulation which impinges on fundamental rights is nonetheless "valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 84, 89 (1987). The Court further explained that this

> standard is necessary if "prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations." Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

Id. at 89 (quoting *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128 (1977) (rejecting First Amendment challenge to prison regulations), and *Procunier*, 416 U.S. at 407). *See also Lewis v. Casey*, 116 S.Ct. 2174, 2185 (1996). And in *Thornburgh v. Abbott*, 490 U.S. 401, 415-19 (1989), the Court made clear that even when fundamental constitutional rights are implicated, prison officials are not required to "set up and shoot down every conceivable alternative method" of accommodating a right.

The Court has shown a like degree of deference in its cases which hold that the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishments" applies not only to punishments imposed pursuant to a sentence but also "to some deprivations that were not specifically part of the sentence but were suffered during imprisonment." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

Thus, in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), the Court held that an Eighth Amendment violation "is manifested by prison doctors in their response to the prisoner's needs or by prison guards

in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-05 (footnotes omitted). The Court, however, further explained that "[t]his conclusion does not mean . . . that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." *Id.* at 105. Out of respect for the deference that corrections administrators require to manage their prisons, the Court thus held that the Eighth Amendment is not violated unless administrators act with "deliberate indifference to [the] serious medical needs of [their] prisoners." *Id.*

The Court has further explained that even where prison conditions are "harmful enough to satisfy the objective component of an Eighth Amendment claim, whether [an administrator's conduct] can be characterized as [stating a claim also] depends upon the constraints facing the *official*." *Wilson*, 501 U.S. at 303. This rule applies to all conditions of confinement claims because "as a general matter, the actions of prison officials with respect to these nonmedical conditions are [not] taken under materially different constraints than their actions with respect to medical conditions . . . [making] 'it . . . appropriate to apply the "deliberate indifference" standard articulated in *Estelle*.'" *Id.* at 303 (quoting *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987)).

Most recently the Court reiterated that the Eighth Amendment "incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (internal quotations & citations omitted). As the Court has recognized, this standard is nothing less than a manifesta-

tion of the balance struck by the text of the Eighth Amendment, which "does not outlaw cruel and unusual 'conditions,'" but rather "outlaws cruel and unusual 'punishments.'" *Id.* at 837.

That the Constitution provides state prison administrators with a zone of deference is simply an acknowledgment that "the realities of running a penal institution are complex and difficult." *Jones*, 433 U.S. at 126. As this Court has noted:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation . . . are boundless.

Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973). *See also Turner*, 482 U.S. at 84-85 ("[r]unning a prison is an inordinately difficult undertaking").

2. Affirmance of the court of appeals' holding would make state prison administration substantially more "complex and difficult" than it already is. *Jones*, 433 U.S. at 126. As the Court noted in *Preiser*, prison administrators are responsible for every aspect of prisoners' lives. *See* 411 U.S. at 491-92. Such fundamental administrative decisions as allocating jobs in prison industries, spaces in educational and vocational training programs, recreational opportunities, and

other institutional privileges are likely to prompt an ADA suit. *See, e.g., Amos v. Maryland Dept. of Pub. Safety & Corr. Servs.*, 126 F.3d 589, 591 (4th Cir. 1997); *Love v. Westville Corr. Center*, 103 F.3d 558 (7th Cir. 1996). This is a consequence of no small moment given the highly litigious nature of prisoners, *see, e.g.*, Judicial Conference of the United States, *Long Range Plan For The Federal Courts* 63-65 & n.14 (1995),[2] and that prison populations are likely to have a much greater percentage of persons with an ADA covered disability than the population at large.[3] *See, e.g.*, Malcolm L. Lachance-McCullogh & James M. Tesoriero, "AIDS," in *Encyclopedia of American Prisons* 14 (Marilyn D. McShane & Frank P. Williams III, eds., 1996) ("HIV infection rates in prisons ex-

[2] The Fifth Circuit has observed that " 'pro se civil rights litigation has become a recreational activity for state prisoners,' and prisoners have abused the judicial system in a manner that non-prisoners simply have not." *Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir. 1997) (quoting *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam)).

[3] The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment." 42 U.S.C. § 12102(2). The Justice Department's regulations state that

> [t]he phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction and alcoholism.

28 C.F.R. § 35.104.

ceeded the general population by as much as five or six to one"; National Institute of Justice/Center For Disease Control survey "reflected an AIDS incidence rate in prison that was twenty times higher than that of the 1992 U.S. general population").

As further example, a survey of all state and federal prison systems found that 10.7 percent of inmates have a learning disability, 4.2 percent suffer from mental retardation, 7.2 percent have psychotic disorders, and 12.0 percent have other psychological disorders. Louis and Carol Veneziano, "Disabled Inmates," in *Encyclopedia of American Prisons*, at 159. One study has "found that the prevalence of psychological disorders among prisoners in state, federal, and military prisons varied . . . from 7 to 10 percent," and another "found that 42 percent of the inmates tested had a learning deficiency, and that 82 percent of those with learning deficiencies were classified as learning disabled." *Id.* Numerous other inmates suffer from alcoholism and drug addiction. *See Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996); *see also* The National Center on Addiction and Substance Abuse, *Behind Bars: Substance Abuse and America's Prison Population* 2 (1998) (estimating that 80 percent of inmates have history of drug or alcohol abuse).

The application of the ADA to state prison systems would exacerbate the already "Herculean obstacles to [the] effective discharge" of prison administration. *Procunier*, 416 U.S. at 404. In most state prison systems, inmates are classified and assigned to a particular facility, in part, based on their disabilities. *See* Edith E. Flynn, "Diagnostic and Reception Centers," in *Encyclopedia of American Prisons*, at 152-54. Ad-

ministrators engage in this practice to meet disabled inmates' needs in a cost-effective manner. Yet if the ADA applied, this practice would apparently conflict with the Justice Department's regulation stating that "[a] public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2).

Indeed, classification decisions have already prompted ADA suits on the ground that they violate an inmate's right to be mainstreamed in the general prison population. *See, e.g., Amos*, 126 F.3d at 591 (claim by prisoners that their assignment to a particular institution because of their disabilities "depriv[ed] them of the opportunity to serve their sentences at available facilities closer to their homes" as well as "equal access to bathrooms, athletic facilities, the 'honor tier,' and food services"); *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3398 (Oct. 20, 1997) (No. 97-686).

If the ADA applied, the decisions of corrections administrators allocating scarce resources such as placement in prison jobs or educational courses would be subject to endless judicial second-guessing, a result which is contrary to this Court's longstanding recognition that federal courts are not to become "the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" *Turner*, 482 U.S. at 89 (quoting *Procunier*, 416 U.S. at 407). And

ironically, the costs state prison systems incur in litigating ADA suits—which, in addition to their own legal costs, might include damages, attorney's fees, and costs of complying with injunctions—will result in administrators having even fewer funds with which to meet inmate needs. *See, e.g., Love*, 103 F.3d at 559 (affirming judgment awarding prisoner $30,948 in damages and $39,536.75 in attorneys' fees).

B. Congress Did Not Intend To Apply The ADA To State Prisoners

Ignoring this Court's longstanding recognition of the centrality of prison administration to the States' sovereign interests, the court of appeals held that the literal language of the ADA's "public services" provision manifests Congress' intent to apply the statute to state prisoners. To reach this result, the court of appeals engaged in a superficial reading of the statutory language, ignoring other telling indications in the statute itself which demonstrate the implausibility of its holding. *See* Pet. App. 4a. Most revealing is the lower court's extensive reliance on the Justice Department's regulations rather than on probative indicia of Congress' intent. This would, of course, be unnecessary if Congress' intent was clear. *See id.* at 5a-6a.

The Court, however, has never held that a federal agency's construction of ambiguous statutory language should be given effect when it would fundamentally alter the federal-state balance. Indeed, the Court has repeatedly required a clear statement by Congress to ensure that it "'"has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."'" *Gregory v. Ashcroft*, 501 U.S. at 461 (quoting *Will v. Michigan*

Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))). As the Court has further noted, "[t]his plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

Adherence to this rule is of the utmost necessity given the enormous burdens that ADA application would have on state prison systems. As explained above, inmate populations have a much higher incidence of ADA covered disabilities than the population at large. *See supra* pp. 12-13. Moreover, in contrast to other ADA covered entities, prison administrators oversee every aspect of inmates' lives.[4] *See Preiser*, 411 U.S. at 492. Applying the ADA to prisons would impose enormous burdens on the States and interject the federal courts into the most sensitive areas of penological policy. The court of appeals simply ignored these unreasonable consequences, which compel a more thorough analysis of the statutory language and its context, purposes and history. *See, e.g.*, *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (declining to "attribute to Congress the intention to . . . open the

[4] An employer, for example, may rightfully be required to provide a disabled employee with a reasonable accomodation so as to enable the employee to perform a job. As a general matter, however, an employer's ADA obligations will begin and end with the workday. The employer, for example, will not bear responsibility for removing architectural and transportation barriers unrelated to its workplace. In short, the employer's burden is limited; it does not encompass every aspect of a disabled employee's life.

door to . . . obvious incongruities and undesirable possibilities") (quoting *United States v. Dow*, 357 U.S. 17, 25 (1958)).

The notion that Congress intended by §§ 12131 and 12132 to apply the ADA to state prisons and their inmates is belied by the caption Congress gave the relevant provisions. Subchapter II is entitled "Public Services." *See* 42 U.S.C. § 12131. As the Fourth Circuit has noted, this caption " 'connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded.' " *Amos*, 126 F.3d at 596 (quoting *Torcasio v. Murray*, 57 F.3d 1340, 1346 (4th Cir. 1995)). To suggest that a prisoner, who has been committed to the custody of a State's corrections department for a term of imprisonment, is receiving "public services" is to ignore that members of the public at large cannot, and do not desire to, receive these "services." Prisons simply do not provide "public services" as a state university or park system does.

For similar reasons it is implausible to suggest that Congress intended that the term "qualified individual with a disability" would embrace state prisoners. 42 U.S.C. § 12131(2). As Congress defined the term, a person is not deemed to be a "qualified individual" unless he "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* Even if jobs in prison industries or places in a prison course of instruction constitute a program or activity, here, too, members of the public ordinarily do not "meet[] the essential eligibility requirements" for "participation in [prison] programs or activities," *i.e.*, incarceration in prison upon conviction of a criminal offense. Indeed, it is odd to think of punishment

by incarceration for commission of a crime as an "essential eligibility requirement[]," *id.*, for one's "access to public services." *Id.* § 12101(a)(3).

That Congress did not intend for the ADA's "public services" provisions to apply to state prisoners is buttressed by the findings it made. These findings clearly demonstrate that Congress intended that the ADA would principally apply to disabled individuals living in free society and not prisons. *See generally* 42 U.S.C. § 12101(a). Most significantly, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3). Notably, Congress did not include such terms as "incarceration," "imprisonment," or "corrections" in this finding. This a telling omission given that at the time of the ADA's enactment there were approximately 700,000 prisoners in state custody, *see* U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 610 (1993), a population which greatly exceeded the number of patients then institutionalized in state mental hospitals and residential facilities for the mentally ill.[5] *See* U.S. Department of Commerce, *Statistical Abstract of the*

[5] In its ordinary meaning, the term institutionalization connotes the act of "plac[ing] (a person) in the care of an institution," which is [a] place for the care of persons who are destitute, disabled, or mentally ill." *The American Heritage Dictionary Of The English Language* 936 (3d ed. 1992). *See also Webster's Third New International Dictionary* 1172 (1986) (defining institutionalization as "the action or a result of institutionalizing <the [institutionalization] of the insane>").

United States 1997 137 (1997) (Tables Nos. 204 & 205).

Congress also found that

> the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and . . . the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous[.]

42 U.S.C. § 12101(a)(8) & (9). Prisoners, of course, do not engage in "independent living." *Id.* Nor are they entitled to "full[y] participat[e]" in, or "to pursue those opportunities for which our free society is justifiably famous." *Id.*

As the tenor of these and Congress' other findings demonstrate, Congress enacted the ADA to address discrimination against the disabled in "our free society." *Id.* None of the nine comprehensive findings which Congress made manifests an intent to provide state inmates with the protections of the ADA.[6] The

[6] Congress also stated that its purpose was "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). While prison populations contain large numbers of disabled inmates, the policies and rules of state prison administrators cannot be reasonably understood as being a "major area[] of discrimination faced day-to-day by people with disabilities." *Id.* Only a small fraction of the estimated forty three million disabled Americans are ever imprisoned; prison administrators' policies and rules are simply not a "major area[] of discrimination faced day-to-day" by the disabled.

absence of any reference to "corrections" or "incarceration" in its numerous findings demonstrates that Congress would have viewed a judicial interpretation that the statute protects state prisoners as an unintended and unduly disruptive result.

The legislative history supports this conclusion. As one of the House Reports notes, the ADA "will permit the United States to take a long-delayed but very necessary step to welcome individuals fully into the mainstream of American society." H. Rep. No. 485(I), 101st Cong., 2d Sess. 24 (1990), *reprinted at* 1990 U.S.C.C.A.N. 268. *See also* H. Rep. No. 485(II), 101st Cong., 2d Sess. 50, *reprinted at* 1990 U.S.C.C.A.N. 332 ("there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life"). As these statements make clear, Congress' concern was protecting disabled persons in free society.

It is no answer that Congress intended the ADA to apply to inmates because many of them are eventually released and "have the same interest in access to the programs, services, and activities available to the other inmates of their prison as disabled people on the outside have to the counterpart programs, services, and activities available to free people." *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997). The Equal Protection Clause already prohibits state prison administrators from engaging in irrational discrimination against disabled inmates; 42 U.S.C. § 1983 provides remedies for such violations. Imputing to Congress an intent to provide inmates with substantive protections in excess of those provided by the Equal Protection Clause not

only raises a troublesome constitutional question over the scope of Congress' powers to enforce the Fourteenth Amendment, *see City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), it also interjects the federal courts into the most complex questions of the States' penological policies.

The Court has repeatedly recognized that statutes should be construed to avoid serious constitutional questions " 'unless such [a] construction is plainly contrary to the intent of Congress.' " *New York v. United States*, 505 U.S. 144, 170 (1992) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *see also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1917) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."). Because there are numerous indications in the statute that Congress did not intend for the ADA to apply to state prisoners, the Court should adopt a construction that avoids these constitutional questions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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